



April 27, 2020

Supervisor Chris Lopez, Chair
Monterey County Board of Supervisors
168 Alisal Street
Salinas, CA 93901

SUBJECT: DEVELOPMENT DEVALUATION SYSTEM

Dear Chair Lopez and Members of the Board of Supervisors:

We commend County staff for addressing many of LandWatch's previous concerns.

There is one major issue outstanding. The proposed ordinance does not accurately reflect the language of General Plan Policy LU-1.19 that provides that the DES "shall be a pass-fail system. This means that the *DES system is intended to prohibit projects that do not obtain a passing score.* "Shall" is mandatory language.

Despite this, the following section would permit the decision-making body to ignore the DES objectively-determined score to approve a project with a failing score:

A passing score does not guarantee ultimate project approval. A failing score does not guarantee ultimate project denial. However, according to the ordinance, projects with a failing score will be referred to the appropriate hearing body with a recommendation of denial by staff.

(Staff report, Exhibit D, p. 1, emphasis added.) This undercuts the intended purpose of the DES and is inconsistent with the mandatory "shall" language in Policy LU-1.19 and the language that requires a "systematic, consistent, predictable, and quantitative method" to evaluate projects in a "pass/fail system." The ordinance should not contain language that permits the objective standards to be ignored on an *ad hoc* basis.

In prior hearings, County staff expressed concern that the ordinance should be designed to ensure that decision-makers retain discretion over land use approvals. The County has *already* exercised its discretion to regulate land use by adopting Policy LU-1.19, just as it adopted other policies that absolutely bar certain types of land uses. An agency is clearly free to enact the necessary ordinances to implement its General Plan policies through non-discretionary limits on development. For example, there is no question that the zoning ordinances may absolutely bar certain uses in certain zones or mandate a particular density level. Thus, the County is free to use the DES ordinance to set up an absolute bar to development projects that do not obtain a passing score.¹

¹ In addition, the County clearly retains discretion to deny a project even if it obtains a *passing* DES score. The County cannot legally abdicate its discretion to deny a project, regardless of its DES score, under provisions of statute and ordinance that are unrelated to the DES, including CEQA, the Planning and Zoning Law, the Subdivision Map Act, and other local zoning and map ordinances.

Furthermore, we believe that the mandatory language in Policy LU-1.19 *requires* that the DES ordinance prohibit projects that do not have a passing score, not merely generate a “recommendation of denial” from staff.

There is a safety valve. The County need not treat a failing score as an absolute bar to development. As with other zoning constraints on development, the County may consider the use of a zoning variance in exceptional circumstances.

A variance is appropriate “when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.” (Government Code, § 65906; Monterey County Code, Chapter 21.72.) Thus, the existing variance procedure is well suited to relieve any hardship that might be occasioned by strict application of the DES ordinance. If the DES system results in disparate treatment, a variance may be warranted.

However, a variance shall “not constitute a grant of special privileges inconsistent with the limitations upon other property in the vicinity and zone in which such property is situated.” (Id.) Thus, the variance procedure is also well-suited to ensure that the County does not apply *ad hoc* decision-making to grant “special privileges” that would subvert its policy to apply an objective, pass-fail development evaluation system outside Community Areas, Rural Centers, and Affordable housing Overlays.

We strongly recommend that projects that fail the objective, pass/fail DES criteria be denied. We ask that the County substitute the following language for the language quoted above:

Project's receiving a passing score are not automatically approved if they are subject to discretionary decision making under statutes or other ordinances, including, but not limited to, CEQA, the Planning and Zoning Law, the Subdivision Map Act, and County zoning and subdivision ordinances. Project's receiving a failing score shall be denied. Projects that are denied may seek a variance through the procedures in Zoning Code Chapter 27-72 where warranted.

We believe this language is more faithful to the language and purpose of Land use Policy LU-1.19.

Sincerely,



Michael DeLapa
Executive Director